

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR08-759

DWAYNE CLARENCE DURELL
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered April 8, 2009

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT,
[NO. CR-2007-2133-1]

HONORABLE WILLIAM A. STOREY,
JUDGE

CONCURRING OPINION ON
DENIAL OF REHEARING

JOSEPHINE LINKER HART, Judge

I agree that it was proper to deny rehearing on this case, notwithstanding the appellant's correct assertion that the analysis in the majority opinion was flawed. As written, I believe the opinion cannot be harmonized with this court's decision in *Cooper v. State*, 84 Ark. App. 342, 141 S.W.3d 7 (2004), in which we reversed a conviction of possession of paraphernalia with intent to manufacture where the alleged methamphetamine lab was found in a locked room for which the appellant did not have a key. Nonetheless, the conviction in the instant case must be affirmed because there was sufficient evidence linking appellant to drug paraphernalia found in the front of the shop where he clearly had access.

Josh McConnell of the Washington County Drug Task Force testified that appellant's driver's license was found next to a pack of Sudafed that had a note written on it that you could buy two packs at a time. McConnell explained that the notation was significant

because Sudafed was “the main ingredient for cooking methamphetamine” and “Arkansas has a new ephedrine law that says that you can be charged with over-the-limit Sudafed.” He stated that methamphetamine manufacturers were “watching themselves.” McConnell further testified that there were coffee filters and a Pyrex dish that smelled of camp fuel that had appellant’s first name on the cover. He noted that camp fuel and coffee filters were used in the manufacture of methamphetamine.

Drug paraphernalia is defined by statute as “all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in ... manufacturing, ... a controlled substance in violation of subchapters 1-6 of this chapter[.]” Ark. Code Ann. § 5-64-101(v) (Repl.2005). Under § 5-64-101(v), in order to determine whether an object is drug paraphernalia, courts are directed to consider, “in addition to all other logically relevant factors, the following: ... (14) Expert testimony concerning its use[.]” See *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). Finally, the Washington County law enforcement officers who participated in the consensual search of the front of the shop testified that appellant attempted to hide a pill soak by covering it. An accused's suspicious behavior coupled with proximity with the contraband is clearly indicative of possession. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994).

In short, although the majority opinion loosely applies precedent and fails to recognize opinions of this court that are directly on point, these flaws do not qualify as true mistakes of law and therefore do not require the grant of appellant’s motion for a rehearing.